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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 805

HENRY G. WOOD, JO. V. MORGAN, ALEXANDER TUCKER, J. H. LEWIS, *Petitioners,*

v.

J. MILLARD TAWES, Comptroller State of Maryland; HARRY O. LEVIN, THOMAS W. KOON, J. DEWEESE CARTER, State Tax Commission, State of Maryland.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

ALEXANDER F. PRESCOTT, JR.,
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CLARENCE E. DAWSON,
Attorneys for the Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

J. MILLARD TAWES, Comptroller State of Maryland; HARRY O. LEVIN, THOMAS W. KOON, J. DEWEESE CARTER, State Tax Commission, State of Maryland.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

The petitioners, Henry G. Wood, Jo. V. Morgan, Alexander Tucker, and J. H. Lewis pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above causes on December 18, 1942, affirming the decisions of the State Tax Commission of Maryland and of the Circuit Court of Montgomery County, Maryland.

OPINIONS BELOW.

The rulings of the State Tax Commission of Maryland (R. 12, 26, 45 and 66) are not reported. The opinions of the Circuit Court for Montgomery County, Maryland (R. 15, 29, 49 and 69) are not reported. The opinion of the Court of Appeals of Maryland (R. 79-87) is reported in 28 A (2d) 850.

JURISDICTION.

The judgment of the Court of Appeals of Maryland was entered December 18, 1942 (R. 88). The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether Maryland can constitutionally tax the income of an individual domiciliary earned outside of the state during the taxable year, before he became resident or domiciled in Maryland.

2. Does the Maryland Income Tax Law violate the rule of implied intergovernmental immunity, as limited by the decisions of this Court; the Public Salary Tax Act of 1939 or the equal protection clause of the Fourteenth Amendment to the Constitution, by imposing a tax upon compensation paid by the United States and its agent, the District of Columbia, to their public officers and employees and, at the same time, exempting compensation paid by the State to its public officers?

3. Has Maryland power under the Constitution, to impose an income tax upon the income of a person domiciled in another state but residing in Maryland on the last day of the taxable year while performing his duties as an officer or employee of the United States, where such duties are performed and the compensation therefor is paid outside of the State?

4. Has Maryland power to impose a tax upon the income of a member of the Armed Forces of the United States, domiciled in another state, but residing in Maryland while in performance of his duties as a member of such Armed Forces?

5. Does the Maryland Income Tax Law violate the Fourteenth Amendment of the Constitution in that it severs the sources of income arbitrarily into two distinct classes, namely, "investment income" and "ordinary income" and applies different credits and rates of taxation to such two classes?

STATUTES INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 20-26.

STATEMENTS.

A number of persons, approximately seventy, consisting of officers and employees of the Federal Government, the District of Columbia, and the Armed Forces of the United States, filed petitions with the State Tax Commission of Maryland, appealing from the assessment of income taxes made against them by the Comptroller of Maryland. These four cases were selected by the parties as typical of four classes of taxpayers and were consolidated for hearing and disposition in the State Tax Commission; in the Circuit Court for Montgomery County, Maryland, and in the Court of Appeals of Maryland. In each of the four cases the income taxed by the State of Maryland was compensation paid to the taxpayers by the Federal Government or the District of Columbia. Such compensation was paid, and the services were rendered outside of Maryland. Hence, in all four cases there arise the questions of implied intergovernmental immunity and unlawful discrimination. These are the only questions involved in the case of Jo. V. Morgan. The case of Henry G. Wood involves the additional question of whether that portion of the income

earned by and paid to him outside of Maryland before he became a resident or was domiciled therein is constitutionally taxable by the State. In the case of Alexander Tucker there is presented this additional question: Can the State of Maryland constitutionally impose an income tax upon compensation paid him for services rendered the Federal Government in the District of Columbia during the time he was temporarily residing in Maryland, when he was admittedly domiciled in New Jersey? The case of J. H. Lewis presents this additional question: Can Maryland impose an income tax upon the compensation paid a member of the Armed Forces of the United States for services performed in the District of Columbia under orders of his superiors, while temporarily residing in Maryland, when he was admittedly domiciled in Michigan?

Re: Petitioner, Jo. V. Morgan.

During the calendar year 1939 petitioner was, and still is domiciled in Montgomery County, Maryland.

In accordance with an Act of Congress approved May 16, 1938, petitioner was on May 18, 1938, duly appointed the sole member of the Board of Tax Appeals for the District of Columbia for a term of four years at a definite annual compensation. He accepted the appointment and took office on July 1, 1938, after having taken the prescribed oath. Throughout the year 1939, the taxable year here involved, petitioner was the sole member of the Board of Tax Appeals of the District of Columbia. Such Board had jurisdiction to review the assessment of all taxes imposed by the District of Columbia, and the power to affirm, cancel, reduce or increase any assessment of taxes. In addition to its definite jurisdiction, such Board of Tax Appeals acts in an advisory capacity in all matters relating to District taxation. Appeals from its decisions lie directly to the United States Court of Appeals for the District of Columbia (R. 19-20).

Under the regulations promulgated by the Comptroller of the State of Maryland and the opinions of the Attorney General of that State, the Comptroller exempted from the operation of the Maryland Income Tax Law the compensation paid by Maryland to its constitutional and public officers, including members of the State Tax Commission, who took office prior to April 13, 1939, the effective date of the Maryland Income Tax Law (R. 19).

Petitioner filed an income tax return with the Comptroller of the State of Maryland reporting his compensation as the sole member of the Board of Tax Appeals for the District of Columbia, but, claiming exemption therefor, did not include the same in the computation of the tax. However, the Comptroller included petitioner's compensation and assessed the deficiency herein involved. Without the inclusion of this compensation no tax is due (R. 19). Petitioner filed a timely appeal to the State Tax Commission of the State of Maryland (R. 19), in which he claimed that if the Maryland Income Tax Statute purports to tax this compensation, it violates the doctrine of implied immunity under the Constitution of the United States, the Fourteenth Amendment thereof, and the Public Salary Tax Act of 1939; in that it discriminates, *inter alia,* against officers or employees of the United States, and of its agency, the District of Columbia, by exempting public officers of the State of Maryland from the tax (R. 21).

The State Tax Commission upheld the assessment. Within the time allowed by statute, a petition for review was filed in the Circuit Court for Montgomery County (R. 27-30), raising the same questions that he had raised in the State Tax Commission (R. 28-29). The Circuit Court for Montgomery County affirmed the decision of the Commission (R. 35). A timely appeal to the Court of Appeals of Maryland was filed which raised the same questions (R. 36-37). The Court of Appeals affirmed the decision of the lower court (R. 87).

Re: Petitioner Henry G. Wood.

Petitioner was duly appointed Legislative Counsel of the United States Senate. He held this position during the entire year 1939. The tax herein involved was assessed upon his compensation as such officer (R. 4-5). This office was created by Section 1303 of the Revenue Act of 1918, as amended by Section 1101 of the Revenue Act of 1924.

Petitioner resided in the District of Columbia from January 1 to March 23, 1939, at which time he purchased a residence in Montgomery County, Maryland, where on December 31, 1939, he was and still is domiciled. Petitioner's duties as Legislative Counsel of the United States Senate were performed and the compensation was paid him by the United States outside the boundaries of the State of Maryland.

A timely income tax return was filed with the Comptroller of the State of Maryland by petitioner, reporting all of his income for the calendar year 1939, including his salary as Legislative Counsel of the United States Senate and income from dividends. Petitioner claimed exemption among others on substantially the same ground as that claimed by petitioner Morgan (R. 5-6). The Comptroller assessed the deficiency here involved. A timely appeal from the assessment was filed with the State Tax Commission (R. 6), before which petitioner claimed exemption on substantially the same grounds as those claimed by the petitioner Morgan; and in addition thereto: (1) on the ground that the Maryland Income Tax Law violated the Fourteenth Amendment of the Constitution of the United States in that it severed the sources of income arbitrarily into two distinct classes, namely, investment income and ordinary income, and applied different credits and rates of taxation to such two classes (R. 11); and (2) that if the Maryland Income Tax Law purports to tax that portion of his income earned outside of the State prior to his becoming a resident of the State, it violates the Fourteenth Amendment of the Federal Constitution in that it is an at-

tempt to tax when the State did not have jurisdiction of either the person or the subject matter (R. 11). The assessment upon petitioner's entire compensation as a public officer of the United States for the calendar year 1939 was sustained by the State Tax Commission (R. 12). Petitioner filed a timely appeal to the Circuit Court for Montgomery County, Maryland, alleging error on all of the grounds relied upon in the State Tax Commission (R. 13-15). The Circuit Court reversed the Commission in respect of that portion of the salary earned by petitioner prior to becoming a resident of Maryland; but affirmed the decision in all other respects (R. 12). A timely appeal to the Court of Appeals of Maryland was filed, which raised the same questions (R. 17). The Court of Appeals reversed the Circuit Court and reinstated the order of the Commission (R. 87).

Re: Petitioner, Alexander Tucker.

Petitioner during the year 1939 and on December 31, 1939, maintained a place of abode in Montgomery County, Maryland, approximately fifty feet from the line separating Maryland from the District of Columbia. He was domiciled in the State of New Jersey (R. 37). On August 1, 1935, he was appointed an attorney in the Department of Justice from the Thirteenth Congressional District, State of New Jersey, and thereafter was assigned to duty in the City of Washington, D. C. His appointment was for an indefinite period of time, to continue at the will of and with the consent of the Attorney General of the United States. In order to perform the duties of his position, petitioner was required to reside in or near the City of Washington. Upon the termination of his present employment he intends to return to the State of New Jersey (R. 38). Petitioner's employment during the year 1939 was that of an attorney engaged exclusively in handling tax matters before the various United States Courts. While so engaged he had the title of Special Assistant to the Attorney General. His

compensation from the United States for the year 1939 was earned by him for services performed outside of Maryland and paid to him outside its boundaries (R. 38). Petitioner filed an income tax return with the Comptroller disclaiming any liability for tax. Upon the information contained in his return and the compensation paid petitioner by the United States, the Comptroller assessed the tax here involved. Petitioner filed a timely appeal to the State Tax Commission (R. 43), in which he claimed that the compensation paid to him by the United States was not subject to tax for substantially the same reasons as petitioner Morgan. In addition, petitioner contended that if the Maryland law purported to tax the income earned by and paid to him outside of Maryland, it violated the Fourteenth Amendment of the Constitution of the United States, for the reason that petitioner was domiciled in New Jersey, and was merely temporarily residing in Maryland (R. 43-44). The Commission upheld the assessment (R. 47). A timely appeal raising the same questions was filed in the Circuit Court for Montgomery County (R. 47). That court affirmed the Commission (R. 47). A timely appeal raising the same questions was filed in the Court of Appeals of Maryland (R. 55). The Court of Appeals affirmed the Circuit Court (R. 87).

Re: Petitioner, J. H. Lewis.

During the entire calendar year 1939 petitioner was domiciled in the State of Michigan (R. 58). In May, 1938, he was ordered to active duty as a Colonel in the National Guard of the United States and directed to report for duty to the National Guard Bureau in Washington, D. C. The orders directing him to so report stated that he would be relieved from duty in time to enable him to arrive at his home in Lansing, Michigan, in May, 1941, on which date he was to revert to inactive status. Colonel Lewis was on duty at the War Department in Washington, D. C., during the entire year 1939. During this period he resided in

rented premises in Chevy Chase, Montgomery County, Maryland.

Petitioner duly filed with the Comptroller an income tax return for the year 1939, in which he claimed exemption from tax on his income received as an officer in the National Guard of the United States. The Comptroller disallowed such exemption and assessed the deficiency in income tax here involved.

Under regulations promulgated by the Comptroller and the opinions of the Attorney General of Maryland, the Comptroller exempted from the operation of the Income Tax Law the compensation paid by Maryland to its constitutional and public officers, including Milton A. Reckord, General in the Maryland National Guard (R. 58). From the assessment the petitioner filed a timely appeal with the State Tax Commission, in which he claimed that the compensation paid him by the United States was not subject to tax for substantially the same reasons as stated by petitioner Morgan. In addition petitioner contended that if the Maryland law purported to tax the income earned by and paid to him outside of Maryland, it violated the Fourteenth Amendment of the Constitution of the United States, for the reason that petitioner was domiciled in the State of Michigan, and was merely temporarily residing in Maryland (R. 65-66). The Commission sustained the assessment. Petitioner filed a timely appeal in the Circuit Court for Montgomery County raising all questions theretofore raised (R. 67-68). That court affirmed the Commission (R. 70). A timely appeal was filed in the Court of Appeals of Maryland, raising the same questions (R. 70-73). The Court of Appeals affirmed the decision of the Circuit Court (R. 87).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals of Maryland erred:

1. In not holding that the Maryland Income Tax Law violates the Fourteenth Amendment of the Constitution of the United States, the rule of implied intergovernmental immunity and the Public Salary Tax Act of 1939 by imposing an income tax upon compensation paid by the Federal Government and the District of Columbia to their officers and employees while exempting compensation paid by the State to its public officers holding office at the date of the enactment of its Income Tax Law.

2. In not holding that the Maryland Income Tax Law violates the Fourteenth Amendment of the Constitution of the United States by imposing a tax on that portion of a person's income earned and paid to him outside of the State prior to his becoming a resident or domiciliary of the State.

3. In not holding that the Maryland Income Tax Law violates the Fourteenth Amendment of the Constitution of the United States by imposing a tax upon compensation paid by the Federal Government to one of its officers or employees domiciled in another state for services rendered outside of Maryland, merely because such employee, in order to perform such services, temporarily resides in Maryland.

4. In not holding that the Maryland Income Tax Law violates the Fourteenth Amendment of the Constitution of the United States by imposing a tax upon the compensation paid by the United States to a member of the Armed Forces, domiciled in another state for services performed by him in the District of Columbia under orders of his superiors, merely because such person, in order to perform such services, was temporarily residing in Maryland.

5. In failing to hold the Maryland Income Tax Law violates the Fourteenth Amendment in that it arbitrarily divides income into two classes, namely, investment income and ordinary income, and applies different rates of taxation to each class.

REASONS FOR GRANTING THE WRIT.

Re: Petitioner, Jo. V. Morgan.

The lower court has erroneously decided an important question of Federal law which has not been, but should be settled by this Court. It involves the interpretation of Section 4 of the Public Salary Tax Act of 1939 (U. S. C. A. Title 5, Sec. 84 (a); c. 59, 53 stat. 575, Title 1, Sec. 4, Appendix, *infra* p. 25).

The lower court held that the taxation by Maryland of compensation paid by the United States and its agent, the District of Columbia, to their public officers while exempting from taxation the compensation paid by that State to its own public officers did not violate either the doctrine of implied intergovernmental immunity, as limited by *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, or the Fourteenth Amendment to the Federal Constitution, or the Public Salary Tax Act of 1939.

1—The discrimination was one of law. It arose from the decision of the Court of Appeals of Maryland in *Gordy* v. *Dennis*, 176 Md. 106, 5 A (2d) 69, that taxation of compensation paid by Maryland to its judges and other public officers violated the Maryland Constitution, since it resulted in the diminution of the salaries it paid such officers. The tax imposed by the Maryland Income Tax Law, unlike the law in *O'Malley* v. *Woodrough*, 307 U. S. 277 is actually a gross income tax.

2—The discrimination was one of fact. It was real. The compensation paid the petitioner by the District of Columbia for his services as the sole member of its Board of Tax Appeals was taxed by the State. At the same time the State exempted the compensation paid by it to its public officers, including members of the State Tax Commission (R. 19).

The Board of Tax Appeals for the District of Columbia has the quasi-judicial function of reviewing the assessment of all taxes in the District, or affirming, cancelling, reducing

or increasing such assessments. In addition, it acts in an administrative advisory capacity in all matters relating to District of Columbia taxation (R. 20). In comparison, the State Tax Commission has the quasi-judicial function to review the assessment of taxes in Maryland. Such jurisdiction is similar to that exercised by the District Board of Tax Appeals (See Sections 191, 192, 194 (a) of Article 81, Ann. Code of Md., 1939, Appendix, *infra* pp. 20-22, and Section 247 of Article 81 Ann. Code of Md., 1939, Appendix, *infra* p. 24). In addition, it has the administrative functions of (a) a corporation commission, (b) of assessing taxes against certain corporations, and (c) of supervision of the administration of the tax laws of Maryland.

The discrimination is *general,* that is to say, between the petitioner, as a public officer of the District of Columbia, and the public officers of Maryland. It is *specific,* that is to say, between the petitioner, as the sole member of the Board of Tax Appeals of the District of Columbia, and members of the Maryland State Tax Commission. It is the kind of discrimination that the Public Salary Tax Act of 1939 intends to prevent. It is because of the source of petitioner's compensation, namely, his employment by the District of Columbia. If petitioner were employed by Maryland his salary would be exempt. It is a play of words to say that the compensation of petitioner was taxable because he was *not* employed by Maryland, and not because he *was* employed by the District of Columbia. A state may not do indirectly that which it cannot do directly. *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, 120; *Gordy* v. *Dennis, supra,* p. 126.

The effect of the discrimination is real. The petitioner is assumed to be proficient in the law of general taxation. Everything else being equal, he would not accept employment by the District of Columbia if he could obtain similar employment with the State of Maryland, since his compensation paid by the former would be subject to Maryland

taxation, while the compensation paid him by the latter would not be taxed.[1]

Furthermore, the court lost sight of the contention that the discrimination does not depend upon the State's technical characterization of its instrumentalities. The question is real, and where State officers are exempted, the burden exists where similar functions are performed through Federal instrumentalities, whether the Federal Government determines to perform such functions through its public offices, officers, or employees. The discrimination violates the rule of implied intergovernmental immunity under the Federal Constitution, as now limited by the decisions of this Court. The tax here involved was not a non-discriminatory tax laid on the income of all members of the community, as was upheld in *Helvering* v. *Gerhardt*, 304 U. S. 405, nor a "non-discriminatory general tax upon income of the employees of the Government" held constitutional in the *O'Keefe* case. In those cases the tax was imposed on the income of *all* of the members of the community, including the public officers of the particular taxing authorities. It is rather that character of tax to which Mr. Justice Frankfurter averted in his separate concurring opinion in the *O'Keefe* case when he observed that "State and federal governments must avoid exactions which discriminate against each other."[2]

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[1] The lower court apparently recognized the soundness of this. It observed that "The discrimination can only be in effect. Discrimination in fact, to be found in a comparison of the situation of similar officers of the state, seems to us the only possible violation of the constitutional and statutory prohibition, and none is found." (R. 86.) Apparently, the lower court was unaware of the stipulation that compensation of the members of the State Tax Commission was *actually* exempt (R. 19), since in the opinion of the lower court it is stated that the compensation of such officials was *not* exempted (R.85).

[2] Compare *Gordy* v. *Dennis*, 176 Md. 106, which holds that to impose the Maryland income tax upon compensation diminishes the compensation, with *O'Malley* v. *Woodrough*, 307 U. S. 277, which holds that the imposition of the Federal income tax does not result in such a diminution.

3—The trial court held (R. 34) that Congress could not grant any power to the State that the State did not already have to impose an income tax, and that Congress could not limit that power in any way. Hence when Congress, in the Public Salary Tax Act, consented to the taxation by the States of compensation of officers and employees of the United States it was only consenting to something the States already had. This question was left open by this Court in *Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21. See concurring opinion of Mr. Justice Frankfurter in the *O'Keefe* case, *supra*, p. 492. This question is one of general importance which should be authoritatively decided by this Court.

Re: Petitioner, Henry G. Wood.

In addition to the questions pertaining to petitioner Morgan, the lower court has erroneously decided the following:

1. The lower court held that Maryland may constitutionally levy a tax upon income earned by and paid to petitioner outside the State prior to his entering the State. The ruling is in effect that Maryland may tax where it has jurisdiction of neither the person nor the subject matter.[3] The Maryland tax is levied upon income. See *Gordy* v. *Dennis*, 176 Md. 106, 120, 129, 132, *et seq.* The tax is a gross income tax. The levy is "computed by adding 6 per cent of the investment income to 2½ per cent of the ordinary income, and subtracting from the amount thus arrived at 2½ per cent of the deductions allowed." (Sec. 230 (a) Art. 81, Ann. Code of Md. 1939, Appendix, *infra*, p. 23.) The decision conflicts with *Hart* v. *Tax Commission*, 132 N. E. 621; *Kentucky* v. *Commissioner*, 152 N. E. 747. This question is important.

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[3] The historical note on page 383 of the Annotated Code of Maryland, 1939, states that Section 222 (i) was modeled in its entirety after the Kentucky Income Tax Law. In *Martin* v. *Gage*, 134 S. W. (2d) 966, the Kentucky court held that the Kentucky law intended to tax only income received after entering the State. Thus the constitutional objection was avoided.

2. The Maryland Income Tax Act of 1939 (Sec. 222 (n), (o), Appendix *infra*, pp. 22, 23) divides income into two classes, namely: "investment income" and "ordinary income". The tax on the first is 6 per cent, on the latter 2½ per cent. The classification violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States,[4] in that it is purely arbitrary and unreasonable. It is in no sense based upon ability to pay. While State legislatures have great latitude in determining proper classifications, search as one may, no valid reason can be found for such a division of income. Any difference in the two classes is irrelevant and artificial. In upholding the tax the decision below conflicts in principle with this court's decision in *Colgate* v. *Harvey*, 296 U. S. 404, 423.

Re: Petitioner, Alexander Tucker.

1—The reasons for granting the writ advanced in the preceding cases apply with equal force in this case.

2—The lower court has erroneously decided a matter of general importance which should be authoritatively decided by this Court. Its decision conflicts in principle with the decision of this Court in *District of Columbia* v. *Murphy, et al.*, 314 U. S. 441.

In this case the State concedes that the petitioner is domiciled in New Jersey, and merely maintained an abode in an apartment in Maryland during 1939 while employed in the District of Columbia by the Federal Government. The income tax here assailed was assessed against the petitioner because the Maryland Income Tax Law of 1939 purported to tax the income of "every resident" wherever earned, and

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[4] Part of the levy here is upon "investment income". See petitioner's return, which though not printed is a part of the record. See Stipulation (R. 3).

This question, though not referred to in the lower court's opinion, evidently because of its former decision in *Oursler* v. *Tawes*, 178 Md. 471, was raised below (R. 14, 17).

defines the term "resident" to mean any individual maintaining a "place of abode" in the State for more than six months of the taxable year, whether domiciled therein or not. (Sec. 222 (i), 230 (a), Art. 81, Ann. Code Md. 1939. Appendix, *infra* pp. 22, 23.) The validity of this section when applied to an individual, domiciled in another state, whose compensation is earned by, and paid to him outside of Maryland is thus placed squarely in issue in this case.

Many of the States[5] have provisions fixing the taxable status of individuals somewhat similar to the terms of Section 222 (i) of the Maryland law (Appendix, *infra* p. 22). The validity of such provisions is a matter of general importance which should be authoritatively decided by this Court. The decision of this Court in *N. Y. ex rel. Cohn* v. *Graves*, 300 U. S. 308, did not decide the question presented, because there the taxpayer was actually domiciled in New York, although she was described in the decision as a "resident". The distinction there was not important. Moreover, the taxing statute of New York requires "permanent" residence. "Residence" within the meaning of the New York statute means an abode "of no transient character and so long continued and so substantial, as to be of a permanent nature". *N. Y. ex rel. Ryan* v. *Lynch*, 262 N. Y. 1. In New York "residence" is synonomous with "domicile". See also *Rockefeller* v. *O'Brien*, 224 Fed. 541, affirmed, 239 Fed. 127 (C. C. A. 6th), certiorari denied, 244 U. S. 50.

A permanent place of abode amounting to domicile is the only reasonable basis for jurisdiction to tax the income of an individual earned and paid outside of the taxing state. To permit a state to acquire jurisdiction to tax the income of a domiciliary of another state, such income being earned

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[5]Six states (Ga., Ky., La., Okla., Utah and Va.) have substantially the provisions as the Maryland law. Ten States (Ark., Col., Ia., Kan., Mont., N. Y., N. D., W. Va., and Wis.) require a "permanent" place of abode. Three states (Cal., Del., and Mo.) have provisions which in effect require domicile or "permanent" abode.

and paid in a third state, because of the mere presence of the domiciliary in the first state for six months, leads to the legal absurdity that many states have the right to tax the same income. Petitioner concedes the state of an individual's domicile has jurisdiction to tax his income from all sources. It is also conceded a state may tax income earned within the state whether or not the recipient is domiciled therein. But if an individual may be taxed upon all of his income in a state in which he merely maintains an abode for an arbitrary length of time, it is clear the same income may be taxed numerous times, particularly if such individual is a Federal employee with a permanent station in the District of Columbia who is required to travel from state to state in the performance of his duties.

The lower court apparently believed that the "credit" provisions of the Maryland law avoided the possibility of burdensome taxation. The credit provisions, however, do not provide such a safeguard. In the first place the rates of taxation in the several states are not uniform. Secondly, some states have a net income tax while Maryland has what is really a gross income tax with rates varying according to the character of the income. Thirdly, the Maryland law qualifies the allowance of a credit by making it dependent upon the provisions of the acts of the other states, which, in effect, nullifies its benefits. (Sec. 231 and 232, Art. 81 Ann. Code, Md. 1939. Appendix *infra* pp. 23, 24.) There is nothing magical in the allowance of a credit. It can not validate an invalid tax. In *Curry* v. *McCanless,* 307 U. S. 357 this Court held that taxation of the same income by two states did not affect the taxing power of either. A necessary corollary to that rule is that the allowance of a credit cannot legalize a tax, otherwise invalid.

The doctrine of *quid pro quo,* upon which the lower court relied is not absolute. *Cohn* v. *Graves, supra* does not go that far. Many persons, such as sojourners, visitors, soldiers on leave using the highways to and from camp and congregating for amusement or for other personal reasons

at nearby places, enjoy the police, sanitary, fire protection, courts and other services of Government. No one would contend (except the officials of Maryland as to soldiers) that such individuals are subject to the income tax laws of the state in which they pause merely because they enjoy the services of government.

Under the circumstances of this case, it is an arbitrary, unreasonable and unconstitutional exercise of the taxing power, in violation of the due process clause of the 14th Amendment to the Federal Constitution, for Maryland to tax the income of this petitioner.

Re: Petitioner, Joseph H. Lewis.

1. The reasons for granting the writ advanced in respect of petitioner Morgan apply with equal force to this case.

Petitioner was an officer in the National Guard of Michigan on active duty in the War Department in Washington. His compensation as such was taxed by Maryland (R. 58), while the compensation Maryland paid to the General of its own National Guard was exempt (R. 58).

2. The lower court erroneously sustained the assessment against petitioner contrary to the provisions of Section 17 of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, approved October 6, 1942. (Public No. 732, 77th Congress, Chapter 581, 2d Session, Appendix, *infra* pp. 25, 26.)

The lower court held that Maryland could lawfully tax the compensation paid by the United States to petitioner, a domiciliary of Michigan, while he was absent from that state in compliance with military orders.

The Maryland Income Tax Law purports to impose a tax on the income of "every resident" of that State (Sec. 230, Art. 81, Ann. Code of Md. 1939, Appendix, *infra* p. 23). Section 222 (i) of that law defines "resident" to mean any "individual who, for more than six months of the taxable year maintained a place of abode within this State, whether domiciled in this State or not" (Appendix, *infra*, p. 22). The Comptroller held petitioner to be a "resi-

dent'' of Maryland, and taxed his compensation accordingly.

Section 17 of the Soldiers' and Sailor's Civil Relief Act Amendments of 1942 (Appendix, *infra*, pp. 25, 26), provides, however, that petitioner ''shall not be deemed to have lost a residence or domicile'' in Michigan while absent therefrom in compliance with military orders, ''or to have acquired a residence or domicile in, or to have become resident in or a resident of'' Maryland. The amendment further provides that ''for the purposes of taxation in respect of the income or gross income of any such person by any State, * * * of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, * * *.'' The amendment is effective as of September 8, 1939. The lower court should have held that the assessment was invalid.

Regardless of the provisions of the amendment, Maryland was without power to tax the compensation paid by the United States to petitioner while he was merely temporarily residing in Maryland during the performance of his military duties.

CONCLUSION.

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

HENRY G. WOOD,
JO. V. MORGAN,
ALEXANDER TUCKER,
J. H. LEWIS,
Petitioners,

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APPENDIX.

ANNOTATED CODE OF MARYLAND, 1939

ARTICLE 81.—*Revenue and Taxes—Appeals*

191. Any taxpayer, any city, or the Attorney General on behalf of the State, or a supervisor of assessments as provided in Section 184[1] of this Article, claiming to be aggrieved because of any assessment or classification, or because of any increase, reduction, abatement, modification, change or alteration or failure or refusal to increase, reduce, abate, modify or change any assessment, or because of any classification or change in classification, or refusal or failure to make a change, by the County Commissioners, the Appeal Tax Court of Baltimore City or the assessing authorities of any other city, may by petition appeal to the State Tax Commission therefrom, and the State Tax Commission shall hear and determine all such appeals within sixty days from the entry thereof with said Commission. Such appeal to the State Tax Commission shall be taken either (a) within thirty days after the date of the action or failure or refusal to act complained of, or (b) if an address shall have been filed with the County Commissioners or the Appeal Tax Court by any person or corporation demanding a hearing as in the next preceding section provided, then by the person giving such address within thirty days from the date of the mailing of the notice of the action by the County Commissioners or the Appeal Tax Court to the person and address so given. No appeal on behalf of a taxpayer shall be allowed under this section from a failure or refusal to abate, reduce or reclassify an existing assessment unless application in writing for such action shall have been filed by the appellant with the assessing authority appealed from within the time limited for the filing of a demand for a hearing by Section 190 of this Article.

1929, ch. 226, sec. 184.

192. A petition of appeal provided for in the last preceding section shall set forth that the assessment or classification is illegal, specifying the ground of alleged illegality, or is erroneous by reason of over-valuation or under-valuation, or that the assessment is unequal in that it has been made

[1] Sec. 177 evidently intended.

at a higher proportion of value than other property of the same class, or said petition may assign any other errors which may exist in the particular case for which an appeal is allowed, and on account of which petitioner claims to be injured. A summons, as well as a subpoena duces tecum, shall issue from the State Tax Commission for the defendant named in such appeal requiring it to produce at the hearing before the Commission the record of its proceedings as well as all maps, plats, documents and other papers connected with the record, and the record, or a copy of the record when properly certified by the signatures of the assessing authority shall be evidence before said Commission in the hearing. The State Tax Commission shall have full power to hear, try and determine the matter, and may require all defendants, their clerks and surveyors, or other agents as they may deem necessary, to attend and examine them on oath or affirmation and may permit or require all such explanations, amendments and additions to be made to any of the proceedings, including the petition of appeal, as it shall determine, so that the case may be properly heard and determined. The said Commission shall not be bound by the technical rules of evidence; but at the request of any party and at his expense all evidence, testimony of facts on which said Commission may act and on which its decision shall be based shall be reduced to writing and filed among the records of the Commission relating to said appeal. The said Commission is empowered to assess anew, classify anew, abate, modify, change or alter any assessment or classification appealed from, provided that in the absence of any affirmative evidence to the contrary, or of any error apparent on the face of the proceedings the assessment or classification appealed from shall be affirmed. The said Commission shall cause its decision on all appeals to be made within the time prescribed and to be certified by its Secretary under the seal of said Commission to the assessing authorities from which the appeal was taken, and to all other parties to said appeal; and such decision shall be final and conclusive in every respect unless an appeal be taken to court as hereinafter provided.

194.(a) Any taxpayer, any city, the County Commissioners of any county, or the Attorney General on behalf of the State, may appeal from the decisions of the State Tax Commission, in the exercise of its appellate jurisdiction on questions of law only, to the Circuit Court of any county or

the Baltimore City Court of Baltimore City, in which the property or any part of the property the assessment of which is involved may be situated, or in which the taxpayer may reside or be taxable in respect thereto or in which the office of the Commission may be situated. Such appeals shall be taken within thirty days from the date of the decision of the Commission complained of, by petition setting forth the question or questions of law which it is desired by the appellant to review, and notice thereof shall be given by summons or subpoena, duly served on all parties directly in interest, by the sheriff of the county or city in which said appeal is filed. There shall be a further right of appeal to the Court of Appeals from any decision of the Circuit Court of the county, or the Baltimore City Court of Baltimore City, as the case may be. Such appeals must be taken within ten days of the final judgment or determination of the lower Court; and the Court of Appeals shall immediately hear and determine such appeal.

Income Tax

1937 (Sp. S.) ch. 11, sec. 215, 1939, ch. 277, sec. 215.

222. (Definitions.) For the purposes of this sub-title and unless otherwise required by the context:

* * * * * * * * * *

(i) "Resident" means an individual domiciled in this State on the last day of the taxable year, and every other individual who, for more than six months of the taxable year, maintained a place of abode within this State whether domiciled in this State or not; but any individual who, on or before the last day of the taxable year, changes his place of abode to a place without this State, with the *bona fide* intention of continuing to abide permanently without this State, shall be taxable the same as a non-resident is taxable under this sub-title. The fact that a person who has changed his place of abode, within six months from so doing, again resides within this State, shall be *prima facie* evidence that he did not intend to have his place of abode permanently without this State. Every individual other than a resident shall be deemed a non-resident."

* * * * * * * * * *

(n) "Investment income" means that portion of the gross income which is derived from dividends, ground rents, an-

nuity income and interest, but shall not include interest earned in the conduct of a business on (1) loans made under the provisions of Article 58A of the Annotated Code of Maryland, (2) business accounts and notes receivable, or (3) instalment contracts.

(o) "Ordinary income" means that portion of the gross income which is not investment income.

* * * * * * * * * *

1937, ch. 277, sec. 223.

230. (Imposition of Tax.) (a) There is hereby annually levied and imposed for each taxable year a tax on the net income of every resident individual of this State and on the net income, taxable in this State, of every individual not a resident of this State. Such tax shall be computed by adding 6% of the investment income to 2½% of the ordinary income, and subtracting from the amount thus arrived at 2½% of the sum of the deductions allowed by Section 224 hereof (as limited by Section 225 hereof) and the personal exemptions allowed by Section 228 hereof.

* * * * * * * * * *

1939, Ch. 277, Sec. 224

231. (Credit Against Tax Allowed Residents) Whenever a resident individual of this State has become liable for income tax to another State upon such part of his net income for the taxable year as is properly subject to taxation in such State, the amount of income tax payable by him under this sub-title shall be reduced by the amount of the income tax so paid by him to such other State upon his producing to the Comptroller satisfactory evidence of the fact of such payment; but application of such credit shall not operate to reduce the tax payable under this subtitle to an amount less than would have been payable if the income subjected to tax in such other State were ignored. The credit provided for by this section shall not be granted to a taxpayer when the laws of such other State allow a credit to such taxpayer substantially similar to that granted by Section 225 hereof.

1939, Ch. 277, Sec. 225

232. (Credit Against Tax Allowed Non-Residents.) Whenever an individual not a resident of this State has

become liable for income tax to the State where he resides upon his income for the taxable year including that taxable in this State, the amount of income tax payable by him under this sub-title shall be credited with such proportion of the tax so payable by him to the State where he resides, as his net income subject to taxation under this sub-title bears to his entire income upon which the tax so payable to such other State was imposed; but such credit shall be allowed only if the laws of said State (a) grant a substantially similar credit to residents of this State subject to income tax under such laws, or (b) impose a tax upon the income of its residents subject to taxation in this State and exempt from taxation the income of residents of this State. No credit shall be allowed against the amount of the tax on any income taxable under this sub-title which is exempt from taxation under the laws of such other State.

* * * * * * * * * * *

1939, ch. 277, Sec. 240.

247. (Revisions And Appeals.) As soon as practicable after each return is received, the Comptroller shall examine and audit it. If the amount of tax computed by the Comptroller shall be greater than the amount returned by the taxpayer, the excess shall be assessed by the Comptroller (within three years from the date the return was originally due or filed, except in the case of failure to file a return or of a fraudulent or incomplete return in which case the excess may be assessed at any time), and a notice of such assessment shall be mailed to the taxpayer. In the event the taxpayer is dissatisfied with his assessment, he may within 30 days from the date of notice, appeal to the State Tax Commission, and upon such appeal being noted on all papers relating to the assessment shall be transmitted by the Comptroller to the State Tax Commission. The State Tax Commission shall set a date within a reasonable time for public hearing, and, on the basis of the law and the facts the State Tax Commission shall sustain the original assessment or make a new assessment. The determination by the State Tax Commission shall be *prima facie* evidence of the amount of tax due, and the State Tax Commission shall give the taxpayer written notice of the assessment of tax, interest and penalties. Nothing herein shall prevent the taxpayer from appealing from the finding of the State

Tax Commission in the manner provided by law for appeals from said Commission in the exercise of its appellate jurisdiction, and the provisions of Sections 194 *et seq.* of this article are hereby made applicable in the enforcement of this sub title.

APPENDIX.

The Public Salary Tax Act of 1939, U. S. C. A., Title 5, Sec. 84(a); (C. 59, 53 Stat. 575, Title 1, Sec. 4)

Section 4. The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal services as an officer or employee of the United States, any territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, *if such taxation does not discriminate against such officer or employee because of the source of such compensation.* (Italics ours.)

Soldiers' and Sailors' Civil Relief Act Amendments of 1942

Public Law 732—77th Congress
Chapter 581—2d Session
H. R. 7164
An Act

To amend the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, to extend the relief and benefits provided therein to cetrain persons, to include certain additional proceedings and transactions therein, to provide further relief for persons in military service, to change certain insurance provisions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Soldiers' and Sailors' Civil Relief Act Amendments of 1942.

* * * * * * * * * *

Sec. 17. Article V of such Act is amended by adding at the end thereof the following:

"Sec. 514. For the purposes of taxation in respect of any person, or of his property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the income or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision or District. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to the date of the enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 805.

HENRY G. WOOD, JO V. MORGAN, ALEXANDER TUCKER, J. H. LEWIS,

Petitioners,

vs.

J. MILLARD TAWES, COMPTROLLER, STATE OF MARYLAND; HARRY O. LEVIN, THOMAS W. KOON, J. DEWEESE CARTER, STATE TAX COMMISSION, STATE OF MARYLAND.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

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Attorneys for Respondents.

The Daily Record Co. Print, Baltimore.

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STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

The petition for certiorari seeks under Section 237(b) of the Judicial Code, as amended to review the judgment of the Court of Appeals of Maryland, entered December 18, 1942, by which said Court affirmed the State Tax Commission of Maryland and the Circuit Court for Montgomery County, Maryland, and held:

(1) That Maryland may constitutionally tax the income of non-domiciled persons who are residents under its statutory definition;

(2) That there is no constitutional discrimination in subjecting to State income tax for the year 1939 the compensation of Federal employees, resident in Maryland merely because a limited number of public officers of Maryland were exempted from income tax for that year under the provision of the State Constitution (Section 35 of Article III) that the salary of a public officer of the State cannot be diminished during his term of office, and because the Court of Appeals held in *Gordy v. Dennis,* 176 Md. 106, that an income tax Act passed during his term diminished the salary of an officer;

(3) In the case of Henry G. Wood that there was no constitutional objection to taxing that portion of his income received prior to March 23, 1939 when he bought a house in Montgomery County and admittedly became domiciled in the State, and has since remained so domiciled. The State Tax Commission of Maryland had so held but the Circuit Court for Montgomery County, Maryland, had reached a contrary conclusion on this point.

OPINIONS BELOW.

The rulings of the State Tax Commission of Maryland (R. 12, 26, 45 and 66) are not reported. The opinions of the Circuit Court for Montgomery County, Maryland (R. 15, 29, 49 and 69) are not reported. The opinion of the Court of Appeals of Maryland (R. 79-87) is reported in 28 A. (2d) 850.

ARGUMENT.

THERE IS NO FEDERAL QUESTION, NOR SUBSTANTIAL QUESTION INVOLVING THE CONSTITUTION OF THE UNITED STATES IN ANY OF THE THREE POINTS PRESENTED.

I.

The statutory definition of "resident" in the Maryland Income Tax Act is valid.

Section 230 of Article 81 of the Annotated Code of Maryland (1939 Ed.), enacted by Ch. 277 of the Acts of the General Assembly of Maryland, 1939 Session, imposes a tax "on the net income of every resident individual of this State." Section 222(i) of said Article of the Code defines a "resident", within the meaning of Section 230, as "An individual domiciled in this State on the last day of the taxable year, and every other individual who, for more than six months of the taxable year maintained a place of abode within this State, whether domiciled in this State or not."

Residence apart from domicile is an entirely reasonable and relevant basis of personal taxation. It has been so held by a number of Courts and writers from the earliest times until the present. See *New York, ex rel. Ryan v. Lynch* (1933) 262 N. Y. 1, 186 N. E. 28; *Chestnut Securities Co. v. Oklahoma Tax Commission* (1942) 125 Fed. 2d 571 (cert. den., 316 U. S. 668); *Bowring v. Bowers,* 24 Fed. 2d 918 (C. C. A. 2d), cert. den. 277 U. S. 608; *Head v. Maxwell* (Ga., 1939) 4 S. E. 2d 45; *Colchensky v. Oklahoma Tax Comm.* (1938) 86 Pac. 2d 329; *Goldberg v. Gray,* 297 N. W. 124; *Attorney General v. Coote* (1817) 4 Price 183-187, 146 Eng. Reprints 423; *Inland Revenue v. Cadwalader* (1904) 7 Sc. Session (5th Ser.) 146-149; *Ottawa v. Nantel* (1921) 51 Ont. L. Rep. 269-276, 69 D. L. R. 427-433; The Problem of Residents in State Taxation of Income, 29 Cal. Law Re-

view 706 (1941); Residence in Income Tax, L. T. 185-277, April 8, 1938; *Soucy v. Knight,* 52 R. I. 405, 409.

It is, of course, settled beyond question, and admitted by the Petitioners that domicile will constitutionally support a tax on income from all sources, including those without the State. *Lawrence v. Tax Comm.,* 286 U. S. 276; *Cohn v. Graves,* 300 U. S. 308. It is likewise clear that a State may tax net income of non-residents from their property, businesses or service within the State. *Shaffer v. Carter,* 252 U. S. 37, 57; *Travis v. Yale & Towne Mfg. Co.,* 252 U. S. 60. This is only to say in another way that the State may tax where its power so exercised bears relation to protection, opportunity and benefits given by the State. The controlling question is whether the State is given anything for which it can ask return. *Wisconsin v. Penney,* 311 U. S. 435; *Graves v. Schmidlap,* 315 U. S. 657; *Curry v. McCanless,* 307 U. S. 357.

This Court has never held that residence alone, as distinguished from domicile, is sufficient to maintain a State income tax, although *Shaffer v. Carter,* supra, and *Lawrence v. Tax Comm.,* supra, clearly accept the premise as unnecessary to discuss and as unchallenged.

The language of *Cohn v. Graves,* supra, is highly significant. In this case, New York was permitted to tax its resident on income from loans and mortgages in another State. The opinion says at pages 312-313 of U. S. 300:

> "That the receipt of income by a *resident* of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. Enjoyment of the privilege of *residence* in a State and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. Taxes are what we pay for civilized society. A tax measured by the net

> income of *residents* is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax which is apportioned to the ability of the taxpayer to pay it *is founded upon the protection afforded by the State to the recipient of the income in his person, in his right to receive the income, and in his enjoyment of it when received.*" (Italics supplied.)

The fact that the opinion says that domicile itself is a sufficient basis for taxation, coupled with a subsequent discussion of residence as such, and the benefits thereof, is strong evidence that residence alone, one of the historical components of the concept of domicile, is actually the controlling element which permits taxation. Indeed, when the reasons why the cases say domicile is sufficient are considered, there seems to be no escape from the conclusion that residence is sufficient. Domicile is a highly unrealistic legal concept. Residence from a tax standpoint is much more realistic. See *Texas v. Florida*, 386 U. S. 398, 429.

This Court has at least twice denied certiorari when residence was held below to be sufficient basis for income taxation. In *Bowring v. Bowers*, supra, 24 Fed. 2d 918, cert. den., 277 U. S. 608, an English businessman resided for much of the time in New York where he owned a place of abode. He was admittedly domiciled in England. The United States Income Tax Statutes taxed the entire income of aliens resident in this country. The Circuit Court of Appeals for the Second Circuit pointed out that, "Residence has been construed by the Commissioner in all of his rulings as something which may be less than domicile," and held the taxpayer liable for tax on his entire income, saying at page 921:

> "But in personal and income taxes domicile has played no necessary part and residence at a fixed date has determined the liability of the tax. * * *

> "In any event, we are bound by the long unquestioned construction of the term *'residence'* by the Department charged with the administration of the revenue acts. The word is fairly capable of the meaning they have given to it *and has often received that interpretation in income tax legislation from the earliest times.* Mr. Bowring acquired an abode here of no transient character and so long continued and so substantial as to be of a permanent nature. He certainly became a resident within the meaning of the Department's regulations. We hold this valid." (Italics supplied.)

In *Chestnut Securities Co. v. Oklahoma Tax Comm.*, supra, 125 Fed. 2d 571, cert. den. 316 U. S. 668, Oklahoma established by its laws a statutory definition of "residence" for both corporate and individual taxpayers. The definition of an individual resident was similar to that of Maryland, the only difference being that seven months of abode were required, instead of six, in any taxable year. The Court held the definitions valid and applicable, and said in conclusion:

> "Thus whether the power to tax rests upon jurisdiction of the person because of residence or citizenship, *Colchensky v. Oklahoma Tax Comm.*, supra, or upon the property located within the State with citizenship elsewhere, *the power to tax is equally plain and within constitutional limits.*" (Italics supplied.)

In the case of *New York ex rel. Ryan v. Lynch*, supra, there was challenged the New York statute which defined a resident for income tax purposes as one who maintains a permanent place of abode within the State and spends more than seven months of the taxable year within the State. The Court said:

> "The definition of 'resident' in the tax law supra, presents no constitutional question. The question here is merely whether such definition rests on a fair

> or substantial basis. This question has no legitimate bearing on any question raised under the Federal Constitution. The decision depends upon the general operation and effect of the statute (*Shaffer v. Carter*, 252 U. S. 37 at P. 55). * * * The statute in itself is quite valid under the Federal Constitution as giving a legitimate definition to the word 'resident'."

The facts in this case including those as to domicile and residence are either stipulated or undisputed, and are accurately set forth in the Brief of the Petitioners, the Record and the decision of the Court of Appeals of Maryland (R. 79).

Mr. Morgan has been domiciled and resident in Maryland all of his life, including, of course, the year 1939.

Mr. Tucker, although domiciled in New Jersey, had lived for three years in Maryland in the same apartment in which he lived during all of the year 1939.

Colonel Lewis, although domiciled in Michigan, lived all of 1938 and 1939 in Maryland.

Mr. Wood became domiciled in Maryland in March 1939, having bought a house in Montgomery County, Maryland, and admittedly has since been domiciled and resident in the State.

It is clear, therefore, that the State of Maryland has given to each of the petitioners benefits and opportunities for which it can exact a fiscal return within the decisions of this Court. It is likewise clear that all of the petitioners, as the Court of Appeals points out (R. 83, 84), were in the State for a definite period that was not transient, and all maintained a place of abode in such a manner and for such a length of time as to afford a constitutional basis for taxation. Some twenty States employ in income tax statutes a definition of "residence" similar to that used in the

Maryland Act. None, as far as is known, has been held invalid. A reference to these States and statutes will be found in the Appendix.

II.

The petitioners were subject to no constitutional discrimination in being required to pay Maryland income tax for the year 1939.

This Court said in *Graves v. New York ex rel O'Keefe*, 306 U. S. 466, 480, that

> "The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, and the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions."

See also:

Helvering v. Gerhardt, 304 U. S. 405;
State Tax Comm. v. VanCott, 306 U. S. 511.

Following the *Gerhardt, O'Keefe* and *Van Cott* cases, Congress enacted the Public Salary Tax Act, now codified as U. S. C. A. 5, par. 48A, which, it is submitted, is merely a legislative declaration of the rule of these cases to show the intention of Congress to permit non-discriminatory State taxation of Federal employees, which did not directly affect the functions of the central government. It is to be noted that the Public Salary Tax Act expressly permits taxing the compensation of Federal Officers "if such taxation does not discriminate against such officer or employee *because of the source of such compensation.*"

The Appellants' claim of discrimination is based on exemption from Maryland income tax for the year 1939 of the salary of a very small percentage of officials of the State government, which was derived from Section 35 of Article III of the State Constitution, providing in part, "nor shall the salary or compensation of any public officer be increased or diminished during his term of office." *Gordy v. Dennis,* supra, 176 Md. 106, held that an income tax is a diminution of salary so that the above provision exempted the salaries of some public officers for the year 1939. (This exemption was removed by an amendment to the Constitution, now Section 35A of Article III for the year 1940 and thereafter.) The exemption was a limited one involving the following characteristics:

(1) The individual exempted must have been a public officer taking an oath of office;

(2) The exemption was limited to a tax imposed during his term of office which presupposed a fixed and definite term;

(3) The term of office must have commenced before April 13, 1939, the effective date of the Income Tax Act;

(4) Persons in the exempt category not only were protected from diminution of salary, *but could receive no increase in salary.* (Except Judges.) A price was paid for the exemption. This, to respondents seems to have removed the exemption from the discriminatory category since it was coupled with a limitation not applicable to persons who did not come within the exception;

(5) Many of the officers exempted from the income tax were subject to a tax on official commissions, payable under Section 101 of Article 81 of the Code. This tax derives from an Act of 1843 representing an attempt to equalize the remuneration received by various State officers in view of the State income tax of 1841.

With these considerations in mind, it is pertinent to compare the Petitioners here with the State officials to whom they claim resemblance. As Chief Judge Bond, speaking for the Court, said below (R. 84, 85):

> "But a difficulty in the way of the argument of discrimination against federal public officers is that the exemption which actually resulted was not so general as supposed. There is no showing in the record of these present cases that Maryland officers in comparable positions were exempted, and such information as the court has is that no similar officer in the state was (fol. 86). And we must take it to be so, as the burden of showing the discrimination charged is on the appellants' charging it.
>
> "The Maryland director of the Department of Legislative Reference, whose position might be regarded as similar to that of Mr. Wood, is not a state officer included within the provisions of Article 3 section 35, that the salary or compensation of a public officer of the state shall not be increased or diminished during his term of office. He has no definite term of office. Acts 1906, ch. 565, Code, Art. 41, secs. 101, 102. And his salary has, in fact, been increased from time to time. Acts, 1935, ch. 92, 1937, ch. 515; and 1939, ch. 284. The members of the State Tax Commission, in whose positions Mr. Morgan seeks an analogy, did not, so far as we are informed, enjoy exemptions of their salaries, if, indeed, they are public officers. The deputies and assistants of the Attorney General of Maryland are without definite terms of employment, and their salaries were not exempted. And no officer of the National Guard of the state, even including the Adjutant General at the head of all of them, enjoyed such an exemption, because they were not regarded as within the class of public officers affected by the cited sections."

It is to be noted that Mr. Tucker claimed that his position was similar to that of Assistant Attorney General of the

State, and that Colonel Lewis related his duties to those of the Adjutant General of Maryland, Major General Milton A. Reckord. The jurisdiction and functions of the Board of which Mr. Morgan is a member, and those of the State Tax Commission of Maryland are quite different as a full comparison will show. The Commission receives, records and approves certificates of incorporation, charter amendments, stock issuance and stock reduction statements, collects bonuses and corporate franchise taxes, and passes on the qualification and registration of foreign corporations. Mr. Morgan's Board does none of these things. It is submitted that, in view of the aforegoing, none of the Petitioners can validly claim discrimination based on the ground of similarity of his office to a tax exempt office in Maryland.

Alive to the difficulties which confront them on this point the petitioners claim that the exemption of the few Maryland officials is a general discrimination against them under the Federal Constitution and the Public Salary Tax Act. To lend it support, they are forced to argue in this fashion:

(a) Certain Maryland officials are exempt because they are paid by the State;

(b) Petitioners are paid by the Federal Government, and are not exempt;

(c) Therefore, Petitioners are taxed because of the source of their compensation.

There are fatal weaknesses in this argument. First, an incidental and occasional exemption cannot be discriminatory in a legal sense and is not, as a matter of fact, in the actual sense. Second, the exemption under the Maryland Constitution is coupled with burdens not applicable to those outside the exemption, in that there can be no increase in compensation during the term of office, and the

office holder very often had to pay the tax on official commission as an offset to non-liability for the income tax. Third, the argument is based on the fundamental fallacy that the exemption results from the source of compensation for the exempt class. This is not so. Petitioners are subject to tax, not because they receive their income from the Federal Government, nor because they do not receive it from the State, but merely because they do not happen to be members of that limited class sheltered by the State Constitution. For example, Mr. Carter, a member of the State Tax Commission of 1939, was taxable on his compensation for that year, since he took office after the income tax act. The persons in the Classified Service under the Merit System are taxable on their compensation. The Assistant Attorneys General are taxable on their compensation, as are practically all other persons receiving compensation from the State. The source of compensation is not the determining factor. The exemption, as has been shown, is based solely on a constitutional provision about which the State was powerless to do anything until the voters amended the Constitution, as they promptly did. The Income Tax Act of 1939 is a general non-discriminatory Act. It applies to Petitioners only in the same manner and to the same extent as it applies to every other resident of Maryland, except the incidental few whose salary as State officials could not be diminished by taxation. The tax does not discriminate against the Federal Government, its employees or anyone else. Petitioners are not taxed because they are Federal employees, but because they are residents of Maryland, and must share the cost of their State government with all other residents. What they seek in fact is to obtain the benefit of an incidental and unplanned exemption to a minute class to which they do not belong, and thus relieve themselves of the obligations of

the general mass of residents. See opinion of the Circuit Court for Montgomery County, Maryland, in the Morgan case (R. 33-35).

It is a settled principle that taxation need never be uniformly exacted and equal. Mere incidental and fortuitous inequalities do not serve to make the tax bad. The principle is succinctly stated in *Maxwell v. Bugbee,* 250 U. S. 525, where this Court said:

> "Absolute equality is impractical in taxation and is not required by the equal protection clause, and inequalities that result, not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."

See also opinion of the Court of Appeals on this point beginning at the third paragraph on page 85 of the Record.

III.

It is constitutional and proper to tax the entire income for the year of one who became domiciled in the State in March.

As is the case of the first two points, there is no Federal or substantial constitutional question involved in the third point. In the first place, there is no contention that Mr. Wood paid the tax on his income for 1939 accruing to him prior to March 23rd of that year, when he became domiciled in Maryland, to any other jurisdiction. If he had paid any other jurisdiction tax on that portion of his income or on any for the year, for that matter, payment would permit a deduction under Section 231 of Article 81 of the Annotated Code of Maryland (1939 Ed.).

The cases supporting the Petitioners on this third point have reached their result largely as a matter of statutory

construction and not on a question of constitutionality. The Court of Appeals decided in the instant case that the Maryland statute did reach the income for the entire year, and there would seem to be no constitutional barrier to this result. There can be no distinction in principle between taxing one's income earned prior to his becoming domiciled in the State, and taxing the income of one domiciled in the State for the entire year, although he had, as a matter of fact, been absent from the State for the whole year. It is conceded that Maryland could do the latter. *Lawrence v. Tax Comm., Cohn v. Graves,* both supra. As this Court said in the last cited case, the income tax is an equitable method of distributing the burdens of government among those privileged to enjoy its benefits. It can hardly be contended that the quid pro quo should be apportioned on a day to day basis. Incomes are not always earned periodically. It would be unreasonable to require a whole year as a basis for computation, and some stated period of the year must be selected to determine liability of the taxpayer for the whole year's income. An abode for the larger part of the year, as has previously been shown, is a fair and reasonable measure to determine the inclusion of taxpayers who are to share in the expense of government on an annual basis. This is no new conclusion. See *Attorney General v. Cootes* (1817) 4 Price 183, 146 Eng. Reprints 433. In that case, the statute made liable the entire annual income of every person who *actually resided* in Great Britain for six successive calendar months *from the commencement of the year in which said person should have been so resident.*

The Petitioners in the case of Mr. Woods make the point that the classification in the Maryland Income Tax Act of 1939 by which investment income was taxed 6% and ordinary income 2½% violates due process and equal pro-

tection clauses of the 14th Amendment to the Constitution of the United States in that it is purely arbitrary and unreasonable. It is submitted that the classification on its face is entirely reasonable. The Petitioners point to *Colgate v. Harvey,* 296 U. S. 404, 423 as authority to the contrary. As a matter of fact, *Colgate v. Harvey* sustains the position of Respondents on this point, and any possible force which the case had in upholding the Petitioners was done away with when *Madden v. Kentucky,* 309 U. S. 84, 93 specifically overruled *Colgate v. Harvey,* as to the one ground which might have conceivably sustained Petitioners.

CONCLUSION.

It is respectfully urged on behalf of the Respondents that the Petition for Certiorari should be denied for want of any Federal or substantial Constitutional question.

Respectfully submitted,

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APPENDIX.

Provisions relating to taxable persons under income tax laws of other States.

Arkansas.

"Resident" is defined as "any person domiciled in the State of Arkansas and any other person who maintains a permanent place of abode within the State and spends in the aggregate more than six months of the taxable year within the State".

Sec. 14025, Statute of Arkansas (Pope) 1937.

California.

"Every natural person who is in the State of California for other than a temporary or transitory purpose is a resident and every natural person domiciled within this State is a resident unless he is a resident within the meaning of that term as herein defined of some other State, territory or country. Every natural person who spends in the aggregate more than nine months of the taxable year within the State or maintains a permanent place of abode within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that such person is in the State for a temporary or transitory purpose".

Vol. 2 General Laws of California (Deering 1937) Act 8494, Sec. 2(K).

Colorado.

"Resident" is defined to include "natural persons domiciled in the state, and others who maintain a permanent place of abode within the state, spending, in the aggregate, more than six months of the taxable year within the state".

Sec. 1, ch. 175, 1937 Session Laws of Colorado.

Delaware.

A taxable person is:

"A natural person twenty-one years of age or over who is a resident of the State of Delaware or who has been a resident of the State of Delaware at any time during the income year."

Sec. 144 (Ch. 6) Revised Code of Delaware (1935) as amended by Ch. 61 Delaware Laws of 1939. (Note: Prior to amendment "citizen or resident" occurred in above section in lieu of "resident".)

Georgia.

"The word 'resident' means natural persons, and includes, for the purpose of determining liability to the tax imposed by this law upon or with reference to the income of any taxable year, any person domiciled in this State, and any other person who maintains a place of abode within the State and spends in the aggregate more than six months of the taxable year within the State".

Sec. 92-3002, Ga. Code of 1933.

Iowa.

"The word 'resident' applies only to individuals and includes, for the purpose of determining liability to the tax imposed by this division upon or with reference to the income of any tax year, any individual domiciled in the state, and any other individual who maintains a permanent place of abode within the state, or spends in the aggregate more than six months of the tax year within the state".

Sec. 6943.036, Iowa Code of 1939.

Kansas.

"The word 'resident' applies to natural persons, including only natural persons domiciled in the state, and others who maintain a permanent place of abode within the state, spending, in the aggregate, more than six months of the taxable year within the state".

Sec. 79-3203, General Statutes of Kansas Annotated (Corrick 1935).

Kentucky.

"The word 'resident' applies only to natural persons and includes, for the purpose of determining liability to the taxes imposed by this Act upon the income of any taxable year, every person domiciled in this State on the last day of the taxable year, and every other person who, for more than six (6) months of the taxable year, maintained his place of abode within this State, whether domiciled in this State or not".

(Ch. 7, sec. 1, 3rd ex. sess. of 1936; ch. 179, sec. 1, Laws of 1940; sec. 4281b-1, Carroll's Ky. State., Baldwin's Revision, May 1940 Supp.)

Louisiana.

"Every natural person domiciled in the State of Louisiana, and every other natural person who maintains a permanent place of abode within the state or who spends, in the aggregate, more than six months of the taxable year within the state, shall be deemed to be a resident of this state for the purpose of determining liability for income taxes under this act."

Section 8587.1, La. Gen'l Statutes Annotated (Dart 1939).

(Note: In Opinions of Louisiana Attorney General, 1936-38, p. 1068, it was ruled that all income of individuals residing, in the aggregate, more than six months of the taxable year in Louisiana is subject to payment of the income tax, regardless of nature and kind of income, and regardless of business producing said income.)

Minnesota.

"The term 'resident' shall mean any individual domiciled in Minnesota and any other individual maintaining an abode therein during any portion of the tax year who shall not during the whole of such tax year have been domiciled outside the state".

Sec. 2394-1, Mason's Minnesota Statutes, 1938 Supp.

Missouri.

Imposes the tax upon "every individual, a citizen or resident of this state, upon net income received from all sources" and upon "every individual, not a resident or citizen of this state, upon net income received from all sources within this state".

12 Missouri Stat. Annotated (Perm. ed.) sec. 10155. (Note: It does not appear that either "citizen" or "resident" is defined in the Missouri law but obviously two different classes of persons are taxed on *all* net income, regardless of source.)

Montana.

"The word 'resident' applies only to natural persons and includes for the purpose of determining liability to the tax imposed by this act with reference to the income of any taxable year, any person domiciled in the State of Montana, and any other person who maintains a permanent place of abode within the state, and spends in the aggregate more than seven months of the taxable year within the state".

Sec. 2295.1, Revised Code of Montana Annotated (1933).

New Hampshire.

"The tax applies to:

"Individuals who are inhabitants or residents of this state on January first in any year, and individuals who have ceased to be residents of this state during the preceding calendar year for such a part of the year as they were residents in this state".

Sec. 2, ch. 65 of New Hampshire Public Laws of 1926 as amended by ch. 35, Laws of 1931.

New York.

"The word 'resident' applies only to natural persons and includes any person domiciled in the state, except a person who, though domiciled in the state, maintains no perma-

nent place of abode within the state, but does maintain a permanent place of abode without the state, and who spends in the aggregate not to exceed thirty days of the taxable year within the state. In addition, it includes any person who maintains a permanent place of abode within the state and spends in the aggregate more than seven months of the taxable year within the state, whether or not domiciled in the state during any portion of said period, and such a person shall be taxed the same as though he had been domiciled in the state during the entire taxable year".

Consolidated Laws of New York, Annotated, Book 59, Art. 16, sec. 350.

North Dakota.

Originally the tax was imposed on "resident individuals" without definition of the term. The law has been amended to provide as follows:

"The word 'Resident' applies only to natural persons and includes for the purpose of determining liability to the tax imposed by this Act upon or with reference to the income of any income year, any person domiciled in the State of North Dakota and any other person who maintains a permanent place of abode within the State, and spends in the aggregate more than seven (7) months of the income year within the State".

Sec. 2346a1 Compiled Laws of North Dakota as amended by Ch. 283, Laws of 1931.

Oklahoma.

"The term 'resident individual' applies only to natural persons and includes, for the purpose of determining liability to the tax imposed by this Act, upon or with reference to the income of any taxable year, any person domiciled in the State of Oklahoma, and any other person who maintains a place of abode within the State and spends in the aggregate, more than seven months of the taxable year within the State".

68 Okla. Stat. Annotated, sec. 874.

Utah.

"The term 'resident' applies only to natural persons and includes, for the purpose of determining liability to the tax imposed by this chapter upon or with reference to the income of any taxable year, any person domiciled in this state and any other person who maintained a place of abode within the state, and spent in the aggregate more than six months of the taxable year within the state".

Title 80, ch. 14, sec. 1, Revised Statutes of Utah (1933) Annotated.

Virginia.

"The word 'resident' applies only to a natural person and includes for the purpose of determining liability to the taxes imposed by this chapter upon the income of any taxable year, every person domiciled in this State on the last day of the taxable year, and every other person who, for more than six months of the taxable year, maintained his place of abode within this State, whether domiciled in this State or not".

Ch. 6, The Tax Code, sec. 23, Va. Code of 1936 Annotated.

West Virginia.

" 'Resident' means any person domiciled in the state of West Virginia, or who maintains a permanent place of abode within the State, or who spends more than six months of the taxable year within the state".

Sec. 975(18), W. Va. Code Annotated (1939 Supp.).

Wisconsin.

"Every natural person domiciled in the state of Wisconsin, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes."

Sec. 2, ch. 544, Laws of 1935.

End